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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 191

UNITED STATES OF AMERICA, PETITIONER,

v.

CLARENCE P. ARZNER

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF CLARENCE P. ARZNER.

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Opinion Below.

Opinion of the Ninth Circuit Court of Appeals (R. 53) is reported in 57 Fed. (2d) 488. There was no opinion in the District Court. The proceeding on the part of the respondent has been throughout in *forma pauperis.*

Jurisdiction.

Petition for writ of certiorari was granted October 10, 1932.

Question Presented.

The question stated in the Government's brief might be more properly restated as follows:

Where the holder of a lapsed policy of war risk insurance reinstates and converts his insurance into an ordinary life policy, and then surrenders this policy, *accepting its* cash surrender value, which accrued by reason of his payments upon such converted policy, is he entitled under Section 307 of the World War Veterans' Act of 1924, as amended by the Act of July 3, 1930, *upon a finding of a jury that he was totally and permanently disabled during the period of his war risk term insurance*, to recover upon such original policy for the total and permanent disability occurring during the life thereof, *although he is unable at such time to surrender his converted policy by reason of its prior surrender?*

Statute Involved.

The particular statute involved is correctly stated in the Government's brief.

Statement.

The Government concedes, as a result of the jury's finding, that Arzner was totally and permanently disabled during the period of his original war risk contract.

Clarence P. Arzner, respondent herein, enlisted in the United States Army on the 29th day of March, 1918, as a member of the 316th Engineers. On September 29, 1918, while operating in the Argonne Sector, he was the victim of shell-shock by explosion of a high-explosive shell, which shock from that time continued as a psychoneurosis neurasthenia with hysterical manifestations, of such a severe character as to prevent his following any substantially gainful occupation.

On June 25, 1918, shortly after enlisting, respondent applied for and was granted war risk term insurance in the amount of $10,000, "payable in monthly installments of $47.50 in the event of his * * * permanent and total disability" during the term thereof.

Arzner's total and permanent disability dates from September 29, 1918. Such was the verdict of the jury, and is admitted by the Government by predicating no error upon the finding of the jury.

The last payment on the term contract was the payment made January 1, 1919, and the policy of term insurance was in full force and effect and the Government's obligation thereunder accrued on the date on which the respondent became permanently and totally disabled.

On March 1, 1920, the respondent, at the behest of the Government agents, signed an application for reinstatement of his $10,000 of insurance, and an application for conversion of the reinstated insurance into an ordinary life policy. At that time he was a patient and ward of the Government by reason of his physical condition. Thereafter the respondent paid the premiums on the converted insurance.

On February 28, 1921, finding himself unable, because of his physical condition, to keep up the payment of premiums, he surrendered $5,000 of the converted insurance, receiving $45.20 as the unearned or cash surrender value thereof. Later, in 1921, for the same reason, he surrendered the other $5,000 of converted insurance, and received for it a total of $18.30 as the unearned or cash surrender value thereof.

Pursuant to the provision of Section 307 of the World War Veterans' Act, as retroactively amended July 3, 1930, this action was instituted. Because of the respondent's physical disability and resultant poverty, he was forced to file and prosecute the action in *forma pauperis.*

Upon trial, the Government contended, on a motion for non suit, that, by reason of the surrender of the converted policies and the acceptance of the unearned or cash surrender value thereof, the respondent was estopped to recover upon the original war risk insurance policy, it being claimed that since Section 307 of the World War Veterans' Act provides for surrender of the policy as a condition precedent to ultimate recovery, the respondent was not in a position to surrender the converted contract for the reason that he had theretofore made a surrender thereof, and that from such surrender an acquittance had resulted, and an estoppel to avail himself of the remedial and retroactive provisions of Section 307, *supra,* follows.

At the time of trial the case of *United States* v. *Andrews,* 43 Fed. (2) 80, was urged as controlling. The trial court was unimpressed by contention of

counsel for the Government, or the case of *United States* v. *Andrews, supra,* and stated:

> "There not being any decision in this Circuit on the question here to be decided, the decision of the Tenth Circuit does not bind the court in the trial of this case.
>
> "I feel that I ought to decide the proposition as it appears to have been decided in my district from which the appeal was taken, and I cannot decide it otherwise.
>
> "I am not compelled to follow the Circuit Court of the Tenth Circuit. I think Judge Cotteral's idea of this statute is correct. I cannot see beyond any question why this boy should now return this policy, having once returned it to comply with the statute. It is true he cancelled it, and it is no longer in effect. He has already surrendered it. There is no use for this court to demand his doing something which he has already done."

The same argument was again presented by the Government upon a motion for a directed verdict, and this motion was likewise denied and judgment was entered upon the verdict of the jury for the respondent.

The Government appealed. The decision upon appeal, 57 Fed. (2) 488, written by Judge Wilbur, is concurred in by Judges Sawtelle and St. Sure. The court fully considered *United States* v. *Andrews, supra,* and stated:

> "We are unable to agree to the conclusion reached by the United States Circuit Court of Appeals, Tenth Circuit."

The judgment of the trial court was affirmed.

Summary of Argument.

Section 307 of the World War Veterans' Act as amended by Section 24 of the Act of July 3, 1930, was designed to permit the recovery by an insured of those rights which had accrued under an original policy of war risk term insurance, regardless of lapse, reinstatement, conversion or surrender of a subsequent converted policy. This conclusion is in accord with:

(1) The injustice sought to be remedied;

(2) The direct expression of legislative intent;

(3) The general rules of construction applied to Government insurance; and,

(4) The justice of the cause.

ARGUMENT.

The Injustice Sought to Be Remedied.

As indicated by the numerous citations in the Government's brief, prior to the enactment of Section 307 of the World War Veterans' Act, as amended by Section 24 of the Act of July 3, 1930, numerous cases had been prosecuted in the Federal Courts for the purpose of recovering because of total and permanent disability, prior to the lapse of an original policy of war risk term insurance and after converted insurance had issued.

The basis, as stated in the Government's brief, for these decisions was not uniform. In some cases recovery was allowed, and in those in which recovery was not allowed, the courts considered such subjects as estoppel, accord and satisfaction, novation, fraud

and mistake (petitioner's brief, pp. 8-9). It was with this situation that the Congress gave consideration to the subject.

Men had paid for a policy of insurance and while it was in full force and effect had suffered the required degree of disability, and were entitled to recover insurance indemnities. By subsequent events of various kinds, veterans unacquainted with their rights, some too far disabled to protect themselves, were, by mounting technicalities, being farther and farther removed from their right to recover insurance for those disabilities which they had incurred. Estoppel from various causes, none having to do with the merits of the veteran's disability, were being asserted in various courts. The situation presented a reasonable one for the interference and expression of Congress.

The petitioner cites at pages 11-14 of its brief the report of the Senate Committee on Finance, Senate Report No. 1128, Seventy-first Congress, Second Session, as giving some key to the legislative intent. Upon the subject here under discussion, the only phrase applicable is:

> "Further provision is made permitting the insured to elect, after a reinstatement or conversion, to go back to some prior contract and claim rights thereunder; and if he proves himself entitled to such rights, upon surrender of the latter contract or contracts, to be paid under the prior contract. *The purpose is to prohibit the raising of estoppel against the claimant either in or out of the court because of his reinstatement or conversion of his insurance.*"

In other words, the Congress was in effect saying that the Government did not desire to take advantage of one who had in fact incurred total and permanent disability and had thereafter, through mistake, inadvertence, fraud, or overreaching on the part of the Government's agents, novation or any other cause, been placed in a position where the Government could urge a reinstatement or conversion as an estoppel to prevent the recovery of a just obligation.

The right to recover upon an original war risk term contract being determined by the verdict of a jury, the converted policy and all transactions under it of necessity fall into the realm of mutual mistake, and to correct this situation, the Congress enacted, in the Act of July 3, 1930, its appropriate amendment to Section 307 of the World War Veterans' Act.

The language of Justice Kenyon in *United States* v. *Schweppe*, 38 Fed. (2d) 595, written prior to the enactment of Section 307 above referred to, is nevertheless apt, as illustrating the situation which prompted the Congress to a legislative declaration.

> "In the light of the verdict of the jury, it is apparent that the proceedings subsequent to July 1, 1919, were the result of a mutual mistake on the part of the Government and the appellee. There was no insurance to be reinstated and none to be converted. It seems to us that it would work a serious injustice to hold that, where there was a mutual mistake on the part of the Government and the appellee, such mistake should be permitted to operate as an estoppel as to one of the parties, and prevent him recovering for his total and permanent disabil-

> ity. Some courts have held that war risk insurance contracts and the law under which they were issued should be construed liberally in favor of the soldier. *United States* v. *Cox* (C. C. A.) 24 F. (2) 944; *United States* v. *Eliasson* (C. C. A.) 20 F. (2) 821. The Government has pursued a liberal policy towards the soldiers who willingly offered their lives to the Government in its hour of trial, and the doctrine of estoppel under the circumstances here presented ought not to be applied. We think the trial court was correct in holding there was no estoppel."

Viewed from the standpoint of the old law, the mischief and the remedy, there should be no other legislative intent indulged in than that the Congress sought to allow to disabled veterans the right of recovery, f[illegible]otherwise, under the interpretation sought by the Government, the veteran would be entitled to the verdict of a jury and after both the veteran and the Government has been put to the expense of trial, for technical reasons in no way affecting the merits of the controversy, the veteran would be deprived of that for which he had paid and which the jury determined he should receive.

The proviso in Section 307, "upon surrender of any subsequent contract or policy," can only, if the injustice imposed by the plea of estoppel is to be remedied, be considered as a safety provision to prevent their continuing as outstanding, policies which because of the veterans' condition as being totally and permanently disabled and so entitled to his rights, are of

no legal standing, and should not therefore be suffered to remain current. A surrender of the policy, therefore, whether made before or after the finding of the jury, must satisfy the statute if recovery of insurance is the thing sought to be permitted and the injustice to which the act is directed is to be remedied.

2.

The Direct Expression of Legislative Intent.

The statement contained in the report of the Senate Committee on Finance, page 6, *supra*, is a direct expression bearing on legislative intent; a statement on the part of Congress that its purpose is to prohibit the raising of estoppel against the claimant either in or out of court, because of his reinstatement or conversion of insurance. It is followed by this:

> "Provision is also contained whereby suit may be brought either in the original action or by alternative plea, in the same suit, with a subsequent policy. Recovery, however, can only be effected upon one of the contracts or policies. The effect of the present practice of the Bureau in raising estoppel is to penalize the man who pays his premiums or tries to continue all or part of his insurance in force. This amendment is specifically made retroactive in order that any cases where the claim has been heretofore disallowed on the ground of estoppel * * * the insured under such contract or policy may if he/she so elects have the benefits thereof."

This is a definite expression of a liberal intent and an invitation to liberal construction for the purpose

of accomplishing the justice sought to be accomplished.

The judgment in this instance constitutes the veteran's first and only recovery of insurance. In the Senate Report it is said:

> "Recovery, however, can only be effected upon one of the contracts or policies."

This contemplates a recovery by suit brought upon the policy as is clearly indicated by the preceding sentence, and we submit that the surrender of a converted policy through inability to pay the premiums accruing thereon, and the receipt back of the unearned premium is not a recovery in any sense in which the Congress was using that word. What they sought to allow was one judicial determination and award of insurance accrued, and what they sought to avoid was a second recovery of insurance indemnity.

No injustice results to the Government from this interpretation, for whether there be a surrender of a converted policy, and a return to the veteran of the unearned premium thereon, or a lapse of such a policy by its absorption in continuing insurance, the Government is out nothing. The veteran is the loser by reason of having paid for that which had theretofore accrued.

It would be a folly of interpretation to reverse this cause, and say that the Congress intended that in the one instance the veteran should recover his war risk insurance because, even though his converted policy has long since lapsed and the unearned insurance value thereof has been eaten up in extended insurance, the

veteran has a piece of paper in his hands which he can surrender, while in the other instance, the veteran should not recover insurance because a mistaken contract has been mutually rescinded, and unearned premiums returned. Such is the illogical result of the several opinions of the Tenth Circuit Court of Appeals, reviewed later herein, and which the Circuit Court of Appeals for the Ninth Circuit refused to follow.

Counsel for the petitioner quoted from the hearing before the sub-committee of the Senate Committee on Finance, Seventy-first Congress, Second Session, on House Resolution No. 10381 (a predecessor bill), pages 90 and 91 (Petitioner's brief, p. 13), as evidencing the legislative intent and spirit of the Congress. The reference to the report of the House Committee is interesting:

> "The report of the House Committee which accompanies the amendment states that it was to protect all policies except the one class of cases where the veteran was not originally entitled to apply. *It is a very drastic provision, more drastic than any commercial contract,* because they usually require the payment of premiums for a period of one or two years."

This certainly evidences an expression on the part of the House Committee that it is its intention and desire, and consequently the intention and desire of the Government, that its veterans should receive the benefit of a law more drastic in its provisions than the stipulations of any commercial contract. It is evidence of a desire on the part of the Government that its

law and its contract should receive a fair degree of liberality in construction and interpretation to the end that veterans should receive that insurance for which they have paid.

From the language of the act itself, which we have under consideration, it is the evident intention that technical defenses should be avoided; that the veteran, if entitled thereto, should be allowed one *recovery of insurance.*

This right is lost if the Government's contention prevails in this case, for, while they concede to the veteran that, being totally and permanently disabled he is entitled to recover had he done thus and so, they would deprive him of the right of recovery because he did not do so and thus. We submit that such an interpretation would violate the evident and expressed intent of the Congress.

3.

The General Rules of Construction Applied to Government Insurance.

The petitioner states that the lower court rested its decision largely upon the ground that the respondent came "within the spirit of the remedial legislation of July 3, 1930." This, they argue, is an erroneous application of a doctrine of liberal construction in favor of the veteran, and cite the cases of *United States* v. *Worley,* 281 U. S. 239, and *White* v. *United States,* 270 U. S. 175, in support of a contention that the doctrine applicable to this case is not a doctrine of liberal construction in favor of the veteran, but rather a so-

called doctrine of strict limitation of benefits of a public gratuity.

It is to be noted, *first*, that the lower court rested its decision upon a determination that the insured in the instant case came under the letter of the Act of July 3, 1930, as well as the spirit of the act. Upon page 490 of the decision reported in 57 Fed. (2), 488, the court says:

> "We think the insured in the case at bar comes under both the letter and the spirit of the Act of July 3, 1930."

In the *second* place, the argument of petitioner for the application of a so-called doctrine of strict limitation of the benefits of a public gratuity is wholly without support at law.

The war risk insurance policies and the law in general are entitled to the most liberal construction in favor of the insured. The foundation of this principle of law is laid in the case of *White* v. *United States*, 270 U. S. 175, quoted in petitioner's brief, in which Justice Holmes, speaking for the court says:

> "All soldiers were given a right to it, and the relation of the Government to them, *if not paternal, was at least avuncular.*"

The doctrine is well stated in the case of *United States* v. *Cox*, 24 Fed. (2) 944:

> "Cases dealing with ordinary contracts of insurance are generally not applicable when considering policies of war risk insurance. A

> policy of war risk insurance is more or less a gratuity from the Government and was so designed to be. The United States assumed all of the extraordinary risks of war, and issued for the minimum premium what might be termed combined accident and life insurance policies, largely in return for the sacrifice to be made by the men of the United States in defense of their country. These policies and the law generally are entitled to the most liberal construction in favor of a soldier. *United States* v. *Law* (C. C. A.), 299 Fed. 61."

This rule is applied to the construction of the policies themselves.

In *McNally* v. *United States*, 52 Fed. (2), 440 at page 443, it is said:

> "These policies of war risk insurance are entitled to liberal construction in favor of the soldier."

The court states in *United States* v. *Phillips*, 44 Fed. (2) 689, at page 692:

> "In view of the policy of the law often expressed by the courts, that these policies are to be liberally construed, we resolve any doubts we have in the matter in favor of the insured."

The rule of liberal construction is likewise applied to the construction of the World War Veterans' Act. *Glazgow* v. *United States*, 50 Fed. (2) 178:

> "The World War Veterans' Act is to be liberally construed in favor of the veterans.

> *White* v. *United States*, 270 U. S. 175; 46 Supreme Court 274, 70 L. Ed. 530; *United States* v. *Cox*, 24 F. (2) 944 (C. C. A. 5)."

In *United States* v. *LePage*, 59 Fed. (2) 165, at page 167, the court says:

> "The Government extended to those in the service during the World War every possible benefit and encouragement to protect themselves and their families against want in case of their death or disability while in the service. The several acts passed for this purpose should be construed liberally in favor of the man in the service and his dependents. The Government should not stand on narrow technicalities where the good faith of the parties is unquestioned. *United States* v. *Cox* (C. C. A.), 24 F. (2) 944."

A careful search of the reported cases involving the interpretation of war risk insurance policies and the World War Veterans' Act will disclose no such doctrine as that contended for by the government of a strict limitation of the benefits of a public gratuity, and the contention of the petitioner is not borne out by the citations in the petitioner's brief.

The Act of Congress of July 3, 1930, amending Section 307 of the World War Veterans' Act, requires a surrender of the subsequent contract as a condition precedent to receiving payment, after adjudication in the veteran's favor upon an action on the war risk insurance policy. If he has already surrendered the policy, there is no occasion to surrender it after judgment. Giving the act a liberal construction in favor of the insured, the fact that he has already surren-

dered the policy before judgment does not change the fact that he comes within both the letter and the spirit of the remedial legislation of July 3, 1930, which legislation is designed to permit the recovery of insurance upon a showing of meritorious right thereto.

4.

The Justice of the Cause.

In this case, the plaintiff was admittedly (by virtue of the verdict of the jury, and by virtue of the stipulation of counsel for the Government waiving in the court below all assignments of error with reference to that principal issue) totally and permanently disabled as a result of battle injury. While suffering the nervous and mental diseases which constituted his disability, the Government by solicitation through its agents, prevailed upon him to convert his insurance at a time when he was an inmate of a mental hospital, placed there by the Government for purposes of treatment.

Unable, because of his physical condition, to meet the premium payments, he surrendered the policy to the Government, receiving as a cash surrender value, only a small portion of the premiums which he had thus mistakenly paid.

The policies of insurance issued by the Federal Government were of two forms. The war risk term insurance carried no paid up or extended insurance values, and had no cash surrender value. At the end of the grace period, such contracts if not matured by death or disability, were of no further force or effect.

The policies of the Government upon the conversion of the war risk term insurance, pursuant to Section 512, Title 38, USCA, provided for cash surrender value, paid up insurance, extended insurance, and policy loan provisions. The governing paragraph of the policy, 5-a, is as follows:

> "(*a*) Upon written request therefor by the Insured made while this policy is in force or not later than three calendar months after the due date of the premium in default and upon complete surrender of this policy, with all claims thereunder, the United States will pay to the Insured the cash-surrender value thereof. The said cash-surrender value at the end of any policy year for which premiums have been paid in full, if no installments on account of total permanent disability have been paid, shall be the reserve together with any dividend accumulations left on deposit, less any indebtedness under this policy * * *"

After making provision for paid up insurance, if so desired, the policy continues:

> "(*c*) Upon default in payment of premium and the expiration of the grace period, if the policy has not been surrendered for a cash value or for paid-up insurance, this policy shall be extended *automatically* as Term Insurance payable in monthly installments for such time from the due date of the premiums unpaid as the cash surrender value will purchase when applied as a net single premium at the attained age of the insured The extended insurance

> **shall be with right to total permanent disability benefits and with right to dividends payable in cash only."**

The policy without reference to the original term insurance, except as physical examination was waived, was a contract unto itself, and the cash surrender or paid up value resulted solely from the accumulation of a reserve and dividends out of the premiums so paid upon the converted policy. For instance, at age 30, an insured could pay for $10,000 of insurance, by payments of $16.90 per month, or a total of $202.80 per year. At the end of one year's time, the policy could be surrendered and had a cash surrender value of $122.70, in other words, the cost of carrying the insurance for the year was $80.10, and the $122.70 constituted the reserve together with dividend accumulations. The $122.70 was available either as cash surrender value or to apply on paid up insurance, or was *automatically* available to extend insurance upon a term basis.

The cases out of which confusion arises with reference to the issue presented by this appeal are three—all arising in the Tenth Circuit.

United States v. *Andrews*, 43 Fed. (2) 80;
Watson v. *United States*, 45 Fed. (2) 589;
Long v. *United States*, 45 Fed. (2) 590.

It is evident from a reading of the decisions that they proceed from a conclusion arrived at in the Andrews case by Judges Lewis and Phillips with which Judge Cotteral, himself the writer of the opinion, was not in sympathy, and we believe that

they proceed from an ill-considered premise and are contrary to the evident intent of Congress in its enactment of Section 307 of the World War Veterans' Act.

In *United States* v. *Andrews,* 43 Fed. (2) 80, the first of the cases arising in the Tenth Circuit, after having had $10,000 term insurance, the appellee applied for and converted $2,000 of the insurance, and thereafter the converted policy was surrendered and its cash surrender value taken. The opinion reads:

> "We are not impressed by the contention that the original policy was extinguished except *pro tanto* by the converted policy for $2,000. There was no evidence of such an agreement, and we find no sanction for it in the statutes. We take the same view as was expressed in *United States* v. *Buzzard* (C. C. A.) 33 F. (2) 883, and therefore hold that, in any event there was no discharge of $8,000 of the term policy by the issuance of the converted policy. The plaintiff established at the trial such disability as entitled him to recover on the basis of insurance to that extent as a matured liability of the Government.
>
> "The discussion of counsel has centered about the converted policy. It is urged both that the appellee was estopped by his representations, and that the judgment should be reversed, in order to allow a prior disposition of the equitable issue upon that policy. The courts are not in harmony as to the regularity of trying such an issue in an action at law * * *"

After quoting Section 307, Judge Coteral continues:

> "This amendment clearly entitles the assured to recover on a term policy by a showing while it is in force of permanent total disability, upon surrender of a converted policy. The appellee has established such disability. He cannot literally meet the condition of surrendering the converted policy, because it has been previously surrendered. *It is the opinion of the writer hereof that he has offered an equivalent by returning the cash value of that policy paid to him, which represents the entire outlay of the Government, and he is entitled to recover on the basis of a total term insurance of $10,000.* The dominant purpose of the statute seems to the writer to be to allow such recovery, without prejudice from having mistakenly accepted a converted policy and enjoyed its benefits, whether in the way of insurance or payment of its surrender value."

While agreeing with Judge Cotteral in his general view of the statute, we call the attention of this court to the fact that the payment of the cash surrender value of the converted insurance does not represent an outlay on the part of the government. It constitutes only a return to the veteran who, by reason of the verdict of the jury, is shown to have been permanently totally disabled, of unearned moneys which he himself has entrusted to its care. As a matter of fact, the Government, upon the finding of the jury, should return to the veteran, who was so disabled at the time of payments, all moneys which were paid on account of premiums on the converted policies but the remedial legislation with reference to veterans' in-

surance has not yet reached that degree of fairness which authorizes action for the recovery of such premiums.

Judge Cotteral, in his opinion, continues, objecting to the judgment of the majority of the court—Judges Lewis and Phillips—and says:

> "But the amendment is construed differently by a majority of the court. They hold that appellee is entitled to recover upon his term policy only on the basis of $8,000 insurance. This is on the ground that he cannot now surrender the converted policy since he has enjoyed the benefits of insurance under it, and it stands as a contract fully performed and executed by the Government. These views of the case prevail and control the judgment of this court. The result is that in this case the judgment is held to be erroneous in awarding to appellee a recovery on the basis of insurance in excess of $8,000."

We submit that the unexpressed views of Judges Lewis and Phillips, as referred to by Justice Cotteral, were erroneous; that it was the purpose of Section 307 to allow full recovery for the full amount of war risk insurance carried to those persons who, as a result of injury within the period covered by the policy, suffered permanent total disability, and that the proviso of Section 307 was designed only to protect the Government against the circulation of its converted policies, when the insured named therein was at the time receiving the full benefit of the Government's insurance laws enacted for his benefit. In other words, no veteran was entitled to more than $10,000 in-

surance with the Government outstanding at any one time, and, having been compelled to pay upon the policy of war risk term insurance, all other subsequent contracts or policies should be surrendered into the hands of the Government, it making no difference whether the surrender antedated or was subsequent to the determination of liability upon the policy of war risk insurance. The surrender of the policy was the thing desired. As the trial court in this case said:

> "There is no use for this court to demand his doing something which he has already done" (C. C. A. Tr. 36).

The Tenth Circuit again had the matter before it in *Watson* v. *United States*, 45 Fed. (2) 589, Judge Phillips writing the opinion. In the Watson case there was a lapse of the term policy, and reinstatement thereof, and a second lapse of the policy. The court found that such reinstatement did not constitute an estoppel to claim total and permanent disability during the period of the original policy, and Judge Phillips, in accordance with his thought with reference to the issue presented in the Andrews case, distinguishes that case by saying:

> "By payment of such surrender value, the United States fully performed and discharged such converted policy. Since such converted policy had been discharged by performance, Andrews was unable to surrender it."

The same conclusion was reached in *Long* v. *United States*, 45 Fed. (2) 590.

This expression of Judge Phillips defines the misconception under which both he and Judge Lewis must have been laboring in their consideration of the Andrews case.

The Circuit Court of Appeals in the Tenth Circuit has taken the view in the Watson and Long cases that where the converted policy merely lapses; that is, where it continues on automatically until the cash surrender value is eaten up by application to continued insurance, the veteran is entitled to recover upon his original war risk term insurance because at that time he has a piece of paper in his hand, the legal force of which has expired, but he is nevertheless in a position to surrender it. While, if the veteran has surrendered the paper and instead of letting the Government have the portion of the premium which it has not earned, and which by the finding of the jury it had no right to receive, he takes the return of that premium, then in such case the veteran should be deprived of the benefits of his world war term insurance, which had accrued and which became payable during the period covered by the policy.

The two results, considering this phase of the policy and the evident intent and desire of the Congress, are entirely inconsistent, the one with the other, for under the program which treats the insurance as having been automatically surrendered; that is, by being eaten up in extended insurance, the veteran has, if he received anything, received something which he cannot surrender as much as if he had received cash surrender value. The converted contract is as fully performed in the one case as in the other.

The conclusion of the Tenth Circuit urged by the Government, for adoption by this Court, is, we submit, contrary to the spirit of the world war veterans' act, and specifically contrary to the demonstrated intent of Section 307 thereof, as amended.

It has been our thought that Judges Phillips and Lewis of the Tenth Circuit, who are the only judges so far as we have been able to determine of the inferior courts who have evidenced any sympathy with the Government's contention, could not have understood that these converted policies of insurance carried no value over from the original term insurance. We feel no hesitation in saying that their conclusion, as expressed by Judge Cotteral, in *United States* v. *Andrews,* 43 Fed. (2) 80, was ill-considered. As will be seen, Judge Cotteral, who wrote the opinion, was not in sympathy with the view of his associates. These judges could not have been cognizant of the actual fact that cash surrender value constituted merely a return to the veteran of a reserve, together with dividends thereon, which had been accumulated in its entirety since the date of conversion, out of money which, because of the veteran's condition as established by the verdict of the jury, the Government had no right to receive.

If the word "surrender" means to yield, render or deliver up, as contended by the petitioner's brief, p. 15, then we submit that all that the Government is interested in was the surrender or yielding up of the document which was the second contract, and that it serves the purpose of the Government as well that it be yielded before as after trial. The surrender is not

the thing in which the Government is interested. It is the prevention of a double recovery. The rule of decision for which we contend and the interpretation of the statute which we support has met the favor of the trial judge who was reversed in the case of *United States* v. *Andrews, supra,* of Judge Cotteral who wrote the opinion in that case, of Judge Neblett, himself of the Tenth Circuit, who heard this case in the District Court, and is the unanimous conclusion of the three judges who heard the case on appeal in the Ninth Circuit.

The interpretation contended for by the Government results in that Government's eating its cake and having it, too, for it has received the premiums which were required by the war risk term insurance, and thereafter in spite of the fact that the veteran to whom it wanted to evidence its liberality, has proven that he became totally and permanently disabled, during the life of the policy, it has accepted premiums from him upon a converted policy which it should not have received; it has paid him nothing in discharge of its insurance obligation. All that it has returned to the veteran is a portion of his own money.

By the strict construction contended for by the Government, if the policy had been lost or destroyed, there could be no strict surrender of the subsequent contract or policy, and yet the Government invites this court to adopt a construction which requires the actual "possession or ownership of the thing to be surrendered" (petitioner's brief, p. 16).

They say that when judgment was entered in the case at bar, the insured had no contract with the Gov-

ernment and did not own or possess the policy of which the statutes required surrender, as a condition precedent. The answer is that by the finding of the jury, he had an accrued right against the Federal government to recover insurance because of his disability. His right of a recovery is not predicated upon the possession of a converted policy. It is predicated upon total and permanent disability incurred at a time when a valid and subsisting contract was in force.

Another thing must be borne in mind. The surrender of his policies by Arzner, which surrender was made primarily necessary by reason of his physical condition and inability to pay, was made at a time prior to the legislative enactment of the right of election which is contained in Section 307 of the world war veterans' act, and he could not in receiving back his $45.20 on one policy and his $18.30 on another policy, have possibly appreciated the fact that he was thereby creating an election which would deprive him of all insurance benefits which had theretofore accrued. To impose upon him such an election as having been intelligently made, is to hold citizens to a knowledge of the actions of Congress before the fact and no court and no judge that we know of has ever imposed upon the humble citizen so unconscionable a burden.

Counsel argue that the Circuit Court of Appeals for the Ninth Circuit has failed to give effect to the underlying purpose of the statutory provision. We submit that it has sensed the true spirit of the act and given it its proper interpretation and effect. The purpose of the act was to permit a recovery of insurance if the

facts warranted it. The proviso was to bar a double recovery.

The decision of the Circuit Court accomplishes this result; the veteran recovers insurance benefits on only one policy. The return of his unearned premiums and the dividends thereon, is certainly not the recovery which the Congress had in mind.

Counsel for the government say that since the lower court did not remit from the amount of the judgment the amounts paid to the respondent as the cash surrender value of the converted policy, that *ipso facto* the lower court has construed Section 307 as amended not only to permit recovery, on the original policy, but *to require* the government to return to the veteran the cash surrender accrual of the converted policy.

The lower court has not gone so far as to say that the government is *required* to pay to the veteran the cash surrender value of a converted policy. It has only said:

> "The fact that he has surrendered it for a paltry consideration which represents the return to him of a portion of the premium which he should never have been required to pay in the first place, does not change the fact that he comes within the letter of the statute in that he has surrendered the subsequent policy."

As a matter of justice, there should be remedial legislation to permit of the recovery by the veteran situated as respondent is, of all of the sums which he paid as premiums upon the converted policies; and counsel for the government in making the contention

which they do make, lose sight of the entire thought and purpose of the World War Veterans' Act.

The court below is certainly right where it says:

> "Under the situation, the insured has been paying the government, where upon the facts as found by the jury, the government should have been paying him."

It was such conditions that the Congress intended to remedy by its legislation.

The petitioner's entire argument to the effect that since the converted policy has been fully performed, there can be no surrender, loses its entire force when we consider that any policy held, and suffered to lapse for nonpayment of premium is none the less continued in force *automatically* as term insurance until the cash surrender value has been absorbed, and is consequently as fully performed as was any contract surrendered for cash surrender value, and yet in the one instance, the government would be willing to pay because the veteran holds the paper, while in the other instance, it would not be willing to pay because the veteran has already given the government the paper.

We cannot agree with counsel's contention that Section 310 of the World War Veterans' Act as added to the statute by the act of May 29, 1928, C-875, 45 Statutes, 970; (U. S. C. Supplement 5, Title 38, Section 512-a) destroys the right which was designed to be accomplished by the remedial legislation under consideration and enacted in 1930. It applied to converted insurance only and has no application to the legislative intent here.

This is conceded by the petitioner (Brief, p. 19). The reasons prompting the enactment of Section 310 are many and take us into fields wholly removed from the legislative intent and purpose supporting the enactment of the law under consideration here.

Counsel complain that the decision of the Circuit Court represents an application of the doctrine of strict construction, which ordinarily applies to insurers. We do not believe that there is any evidence on the part of the court below to adopt a strict construction. Rather it is a liberal construction in accordance with the benevolent character of the legislation which has marked the Government's desire and intention towards its veterans, and especially of its desire and intention to accord ample justice to those veterans who *do not found their case upon a gratuity,* but base it upon a contract by which the sovereign Government agreed to pay them certain indemnity in the event that they should suffer a total and permanent disability while serving that Government during the period of a great emergency. That Government has been liberal in extending the time within which such actions might be brought; it has abolished the defense of estoppel by reason of conversion of the policy, and has enacted many more beneficent measures, all of which only evidence the liberality which the Congress as well as the people of this nation, desire to extend to those *veterans who were willing to stand the fair cost of the hazard of war,* which they did stand, in the premiums which they paid for their war risk insurance.

The spirit of our people and of our Congress is not one which calls for the application of "strict limitation

of the benefits of a public gratuity to those who can clearly meet the statutory requirements," rather the very evident purpose of the Congress and the law is to waive all strict limitations in behalf of the accomplishing of a substantial justice.

At page 21 of Petitioner's brief, in discussing gratuities, counsel say:

> "The statute upon which the suit is predicated was enacted upon the assumption that the rights of the veterans such as the respondent upon their original term policies had been extinguished by the subsequent reinstatement and conversion of the insurance."

We do not follow counsel in this assumption. If this law presupposed no liability under the original policy, why then is the veteran given the right to sue upon the prior policy? Why is that right recognized? Why is he permitted to prosecute it, occupying the time of courts and juries? The right to sue upon an extinguished cause of action is nothing more nor less than a meaningless gesture.

We submit that the statute was passed in recognition of an existing right if it had matured by disability, and through a desire to permit the accomplishing of justice without the intervention of technicalities.

The anomaly of the technical construction contended for by the government is evident in the following quotation (Petitioner's brief, p. 22):

> "The Government of course, does not question the right of a veteran who has converted his term insurance, to sue upon his prior policy,

> even if he has allowed the converted policy to lapse, provided he surrenders the converted policy."

What possible difference in justice can there be between the two provisions: (1) provided he surrenders his converted policy, and (2) provided he has surrendered his converted policy. The Congress has clearly expressed itself to the effect that the veteran who has converted his term insurance may *sue on* his prior policy, even if he has allowed his converted policy to lapse, this without reference to surrender.

The court and the jury and the Government are not under the law to be concerned as to his converted policy until the issue is determined as to whether or not he has a right to recover upon the term insurance contract upon which he sues. Then and then only after the right has been established, it will be incumbent upon the veteran, if he has not theretofore surrendered the converted policy, to surrender the same.

In the case of Arzner he has surrendered the converted policy and yet the Government says to him: you have a cause of action. The law clearly permits it. You may prosecute it to judgment, but after you have done these things, you cannot recover because you cannot twice surrender that which you have surrendered.

The Congress intended no such absurd result. The decision of the Circuit Court of Appeals for the Ninth Circuit, is a well-considered opinion, properly reflecting the spirit and intent of the Congress and accomplishing that degree of justice which all right-thinking citizens must favor.

Conclusion.

We submit that the decision of the Circuit Court of Appeals should be affirmed.

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